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Nos. 90-344 and 90-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRANSWESTERN PIPELINE COMPANY,
Petitioner,
v.
KANSAS POWER AND LIGHT COMPANY, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
PUBLIC UTILITIES COMMISSION OF CALIFORNIA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT THE PROCESS GAS CONSUMERS GROUP IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission has the power under the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.* (1988), to permit an interstate pipeline to bill its customers retroactively and without advance notice for gas costs from a prior period.

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STATEMENT OF THE CASE

On May 11, 1988, the Federal Energy Regulatory Commission ("FERC") approved Transwestern Pipeline Company's ("Transwestern") application to implement a gas inventory charge ("GIC") which included a proposal to eliminate the pipeline's purchased gas adjustment ("PGA") clause and to direct bill its customers for any

negative balances remaining in its Account 191.[1] Pursuant to that authorization, Transwestern billed certain amounts to Williams Natural Gas Company, an interstate pipeline which was in turn allowed to recover the amounts from Respondent The Kansas Power and Light Company ("KPL")[2] and from Southern California Gas Company, a local distribution company regulated by Respondent Public Utilities Commission of the State of California ("CPUC").[3] These charges are ultimately passed through to retail gas consumers, including members of Respondent The Process Gas Consumers Group.

Under FERC's PGA regulations, interstate pipelines, such as Transwestern, project their future purchased gas costs. The difference between these *projected* costs (which are publicly filed as part of the pipeline's tariff) and the costs actually incurred are booked in the pipeline's Account 191.[4] Ordinarily, Account 191 balances are cleared through credits or surcharges applied to the projected gas costs in succeeding PGA periods. For Transwestern, however, FERC approved a different, non-PGA method of recovery. Because the pipeline had elected to eliminate its PGA (in connection with its voluntary application for a GIC), FERC allowed it to use a direct billing scheme to clear its Account 191 of its unrecovered gas costs. Under this direct billing method, Transwestern assigned cost responsibility to its customers on the basis of their respective sales entitlements.

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[1] *Transwestern Pipeline Co.*, 43 FERC ¶ 61,240, *order on reh'g*, 44 FERC ¶ 61,164 (1988).

[2] KPL is a natural gas local distribution company doing business in the states of Kansas, Missouri, and Oklahoma.

[3] CPUC is a state agency charged with protecting the interests of natural gas consumers throughout California.

[4] A pipeline's effective gas rate at any given time reflects its current estimated cost of gas plus a series of surcharges or credits representing prior period adjustments. *See* 18 C.F.R. § 154.305 (1990).

The court of appeals concluded that the filed rate doctrine bars Transwestern's collection of the unrecovered purchased gas costs in Account 191 which had accrued before May 11, 1988, the date of FERC's order approving the pipeline's direct billing mechanism.[5] Recovery of costs accrued before that date was properly held to be barred because, prior to FERC's order, customers had "no meaningful notice" of the charge. *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 581 (D.C. Cir. 1990). The court of appeals rejected FERC's claim of authority to waive the filed rate doctrine, relying in part on the decision by another panel of the D.C. Circuit in *Columbia Gas Transmission Corp. v. FERC* (*"Columbia"*).[6]

REASONS FOR DENYING THE WRIT

There is no basis for Petitioners' attempt to cast FERC's orders below expansively as a key part of the regulatory and market "sea change" in the natural gas industry in recent years. In fact, the challenged ruling of the court below concerns only a minor aspect of one pipeline's election to terminate its PGA. There is neither any reason to believe that the issue, which the pipeline itself could have avoided, is of major practical importance even to the parties, nor any reason to assume that other pipelines have faced or will face similar issues.

The D.C. Circuit's decision rests on a fact-specific determination as to the adequacy of the notice afforded consumers in the unique circumstances of Transwestern's voluntary termination of its PGA. The case involves no new principle of statutory construction nor any other issue of industry-wide significance.

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[5] The court found "no bar" under the filed rate doctrine to the recovery of costs accrued after May 11, 1988. 897 F.2d at 580 n.7.

[6] 895 F.2d 791 (D.C. Cir. 1990), *petitions for cert. filed sub nom. Panhandle Eastern Pipe Line Co. v. Columbia Gas Transmission Corp.*, 59 U.S.L.W. 3005 (U.S. June 22, 1990) (Nos. 89-2001, *et al.*).

The decision of the court of appeals—that FERC may not retroactively impose a different rate from the one on file at the time gas is sold—is wholly consistent with numerous decisions of this Court applying the filed rate doctrine. It properly recognizes that FERC cannot escape its statutory mandate to provide consumers with advance notice of rate changes simply by labelling its actions "policy" initiatives. An agency "does not have the power to adopt a policy that directly conflicts with its governing statute." *Maislin Industries, U.S. v. Primary Steel*, 110 S.Ct. 2759, 2770 (1990) ("*Maislin*").[7]

In sum, the D.C. Circuit's decision does not warrant the exercise of certiorari jurisdiction.

I. THIS CASE INVOLVES A MINOR, ISOLATED MATTER OF NO PRACTICAL SIGNIFICANCE.

As the court of appeals noted, this case was originally selected by the parties to decide a major issue of regulatory policy—the GIC. Importantly, however, "most of the key issues in this case have been rendered moot" and only "peripheral issues survive." 897 F.2d at 573-74.

The "peripheral issue" presented by Petitioners here is whether an as-yet-undetermined amount of Transwestern's deferred gas costs—*i.e.*, those arising before the date (May 11, 1988) that FERC granted Transwestern's request to change the method by which such costs were traditionally recovered—are ineligible for collection under the FERC-approved methodology because of inadequate notice. In fact, the record does not show whether there are any such deferred costs.

Moreover, this case involves unique circumstances that are unlikely to be repeated. Transwestern was not required to terminate its PGA as a condition for institut-

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[7] Although *Maislin* arose under the Interstate Commerce Act, rather than the Natural Gas Act, its holding is equally applicable here. FERC, like the ICC, has no authority "to alter the well-established statutory filed rate requirements." 110 S.Ct. at 2770.

ing a GIC. Thus, despite claims to the contrary by Transwestern (Pet. at 18) and the Acting Solicitor General (Pet. at 9), allowing the decision below to stand will not affect any of the fundamental issues now confronting the natural gas industry. FERC and the pipeline remain free to pursue any lawful means by which the disallowed costs may be recovered in future rates.

II. THE COURT OF APPEALS' FACTUAL DETERMINATION THAT NOTICE WAS INADEQUATE IS CONSISTENT WITH THE CONSUMER PROTECTION OBJECTIVES OF THE NATURAL GAS ACT.

It is significant that Petitioners have not disputed the D.C. Circuit's finding that the rates approved here were, in part, retroactive. Instead, their arguments focus on the court's ruling that customers had not been provided sufficient notice of the rate change to justify an earlier effective date.[8] As these arguments acknowledge, the basis for the decision below was the court's analysis of FERC's position that the statutory notice requirement had been satisfied by the Commission's 1972 general PGA regulations and by two 1986 decisions that did not even involve Transwestern.[9] Thus, notwithstanding Pe-

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[8] As the court of appeals correctly recognized, under FERC's PGA regulations, a pipeline customer normally is not responsible for deferred gas costs once it leaves the pipeline's system; it pays only the filed rates in effect at the time it is being served. 897 F.2d at 580, citing *Kentucky West Virginia Gas Co.*, 37 FERC ¶ 61,310 at 61,912 (1986).

Traditionally, overrecoveries or underrecoveries attributable to gas purchased by *former* customers are treated no differently than other deferred costs. By industry practice and the operation of the PGA regulations, all such deferred costs are included as a surcharge on future rates and recovered through customers' prospective purchases only. *See* 18 C.F.R. § 154.305(d).

[9] Those decisions were *Western Interstate Gas Co.*, 34 FERC ¶ 61,122, *reh'g denied in part*, 35 FERC ¶ 61,012 (1986) and *Locust Ridge Gas Co.*, 37 FERC ¶ 61,295 (1986). The court of appeals did not address arguments, made for the first time in petitions for

titioners' grand characterizations, this case does not pose important legal questions concerning the scope of the filed rate doctrine. Rather, it presents a perfectly ordinary, non-recurring, fact-specific question of whether adequate notice was given as required by the filed rate doctrine and by the explicit provisions of Section 4(d) of the Act. That, we submit, is not a question calling for this Court's attention.

As this Court has long recognized, FERC has no power to change rates retroactively; rather, it is "limited to prescribing the rate 'to be thereafter observed' and thus can effect no change prior to the date of the order." *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). "[T]he Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (*"Arkla"*). *See also FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-53 (1962). The decision below is consistent with, and mandated by, this Court's decisions interpreting the Act and applying the filed rate doctrine.

The filed rate doctrine is embodied in Sections 4(c) and (d) of the Act. The requirement for advance notice of rate changes is explicit in Section 4(d): "notice shall be given"; there must be "public" posting; the proposed change must be stated "plainly." 15 U.S.C. § 717c(d). These requirements reflect the fundamental purpose of the filed rate doctrine, which is "to render rates definite and certain." *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932), quoted in *Maislin*, 110 S.Ct. at 1766. That purpose is essential to the consumer protection objectives of the Act.

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rehearing, that notice was provided by Transwestern's December 1987 filing proposing the charge. *See* Transwestern App. at 26a.

As this Court has stated, the Act was designed to "protect the consumer interests against exploitation at the hands of private natural gas companies," *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944), affording "a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Service Comm'n of New York*, 360 U.S. 378, 388 (1959). Certiorari is not required to confirm the wholly conventional premise underlying the D.C. Circuit's decision here—*i.e.*, that the filed rate doctrine bars FERC from imposing rate changes without proper notice to consumers.

Transwestern (Pet. at 17-22) attempts to frame this case as one in which the agency's interpretation of its governing statute is entitled to special deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (*"Chevron"*). Such efforts, though understandable, are misplaced. Not even the Acting Solicitor General has invoked *Chevron* here, because this case involves not statutory interpretation, but rather the correctness *vel non* of FERC's determination that sufficient notice had, in fact, been given.[10] As Transwestern's own extensive argument makes clear, the court of appeals focused precisely on the *adequacy* of notice, based on its examination of the agency record below. The pipeline's ironic complaint that the D.C. Circuit's analysis is "irrelevant and tedious" (Transwestern Pet. at 27) does not change the factual nature of this inquiry. In any event, *Chevron* does not require deference to agency orders that hinge on erroneous factual conclusions or that contravene the purpose and intent of the statute itself.

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[10] Citing *Chevron*, the court of appeals itself acknowledged that, had FERC explicitly approved a rate and stated when that rate would take effect, the court could not have intruded in FERC's province. 897 F.2d at 578. But the court concluded that such deference was *not* warranted where FERC clearly failed to satisfy the Act's notice requirements.

Transwestern's emphasis on the alleged just and reasonable "end result" of FERC's orders (Pet. at 17, citing *Hope*, *supra*) provides no basis for arguing that the court of appeals should not have addressed whether the rates in question complied with the filed rate doctrine.[11] In fact, the D.C. Circuit acted well within its power to determine whether the agency abused its authority, notwithstanding claims that the end result, however achieved, was reasonable. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968) (the responsibility of the reviewing court is to ensure that the Commission has not "abused or exceeded its authority").

Finally, Transwestern's complaint (Pet. at 26-27) that the D.C. Circuit's decision conflicts with the Natural Gas Policy Act ("NGPA") and FERC's PGA regulations is misplaced. Nothing in the NGPA or the PGA regulations either (1) creates an "entitlement" (Pet. at 26) to the recovery of gas costs in contravention of the Natural Gas Act's notice requirements or (2) protects Transwestern from the consequences of its own decisions. Transwestern *voluntarily* applied for and accepted a GIC certificate, giving its customers the right not to purchase any more gas under the PGA. That customers did what the pipeline invited them to do fails to establish Transwestern's "entitlement" to cost recovery. Moreover, the court of appeals found only that certain costs could not be collected under the mechanism before it; the decision in no way prevents Transwestern from proposing a lawful procedure for recovering any deferred costs it may have incurred before the May 11, 1988 date of FERC's order. And, as previously noted, the record does not show whether there are any such costs.

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[11] In *Maislin*, this Court rejected similar efforts to override the filed rate doctrine. The Court there was unpersuaded by the ICC's labelling the carrier's conduct an "unreasonable practice," since the agency's action was "flatly inconsistent with the statutory scheme as a whole." 110 S.Ct. at 2768.

III. THE COURT OF APPEALS' OPINION IS NOT IN CONFLICT WITH RULINGS BY OTHER FEDERAL COURTS OF APPEALS.

Transwestern argues that the decision below is in conflict with rulings of the U.S. Courts of Appeals for the Fifth and Tenth Circuits in *Texas Eastern Transmision Corp. v. FERC*, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986) and *Phillips Petroleum Co. v. FERC*, 902 F.2d 795 (10th Cir. 1990), respectively. Those decisions uphold FERC orders authorizing the collection of certain production-related costs under NGPA Section 110. 15 U.S.C. § 3320 (1988). In fact, however, there is no conflict among the circuits on the issue at bar.

In *Texas Eastern*, the court found that "purchasers *were on notice* as of 1980" (through FERC's Order 94 rulemaking) of the date when production-related costs would be assessed, even though they were not on notice as to the precise amount of the charge. 769 F.2d at 1066, 1060 n.8 (emphasis added). Here, by contrast, the court of appeals—considering an entirely different series of FERC orders and regulations—found "no meaningful notice in any Commission act before May 11, 1988." 897 F.2d at 581. Even more importantly, in *Texas Eastern*, the Fifth Circuit specifically rejected arguments that rate increases should be allowed as of an earlier date, citing "the purchasers' need for notice." 769 F.2d at 1066. Instead of creating a conflict with the D.C. Circuit, the Fifth Circuit's ruling in *Texas Eastern* lends additional support to the decision challenged here.

Since the Tenth Circuit in *Phillips* never discussed the filed rate doctrine, it is difficult to ascertain any pertinent conflict with the D.C. Circuit's decision. That case was limited to the issue of "whether the Commission followed the *Texas Eastern* mandate." 902 F.2d at 799. The Tenth Circuit's decision had nothing to do with the PGA regulations or agency orders construed here. The

only instance in which the court of appeals there addressed the matter of notice involved FERC's 1987 decision to require producers to have had contractual authority in 1983 to be eligible to collect interest for certain fuel and power allowances. Again, unlike the situation here, the court there found that producers had indeed been "on notice" in 1983 that interest on production-related costs would be allowed only if contractually authorized. 902 F.2d at 804.

The lack of any conflict among the circuits is further shown by the fact that the Acting Solicitor General does not support Transwestern's claim of such conflict.

IV. THIS COURT SHOULD NOT HOLD THIS CASE SUBJECT TO ITS RULING IN *AGD* AND *COLUMBIA*.

The Acting Solicitor General has requested that this case be held for disposition in light of the petitions for certiorari filed in *Associated Gas Distributors v. FERC* (*"AGD"*)[12] and *Columbia*. This request should be denied because the issues in those cases are entirely different.

Unlike this case, which hinges on a straightforward factual determination of whether or not consumers were given adequate notice of a rate increase, *AGD* addresses the issue of whether the rate methodology approved by FERC constituted a retroactive rate increase. Here the petitions argue that customers had notice that they were responsible for paying the costs at issue; in contrast, no petitioner in *AGD* claims that customers knew they would be assessed additional charges for gas which they had purchased years earlier. Thus, there is nothing in the grounds asserted for review of *AGD* to suggest that any foreseeable disposition of that case would affect the holding of the court of appeals in this case.

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[12] 893 F.2d 349 (D.C. Cir. 1989) *petitions for cert. filed sub nom. Berkshire Gas Co. v. Associated Gas Distributors*, 59 U.S.L.W. 3001 (U.S. June 20, 1990) (Nos. 89-1988, *et al.*).

There is even less reason for holding this case pending disposition of *Columbia*. The Acting Solicitor General did not seek plenary review of *Columbia*, requesting instead that it be held for disposition in light of *AGD* (Pet. in No. 90-131 at 18). The Brief for Certain Respondents in Opposition (at pp. 22-23) pointed out the lack of merit in that request for a hold.

There is even less basis for a hold in this case. *Columbia* involves FERC's claim that its statutory authority to waive the Act's 30-day prior notice requirement allows it to impose higher rates for gas purchased by customers many years earlier. Importantly, certiorari was *not* sought with respect to the D.C. Circuit's earlier decision rejecting FERC's claim that adequate notice of this rate increase had been provided through the Order 94 rulemaking process.[13] Thus, the adequacy-of-notice issues which are at the heart of the instant case are not present in *Columbia*. Finally, although FERC did claim in both cases that it could waive the 30-day prior notice provision in the Act, the circumstances assertedly justifying waiver in the two cases are entirely different. As the court of appeals noted, FERC's waiver claim here was "a last stand," and it was questionable whether that claim had any "remaining life" since it applied only to the costs, if any, incurred before the May 11, 1988 date of FERC's order. 897 F.2d at 580 n.7.

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[13] *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *reh'g denied*, 844 F.2d 879 (1988).

CONCLUSION

For the reasons stated, the petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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